17

MAR 7 1946
CHARLES ELMORE CROPLEY
CLERK

No. 921

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

---

WICHITA COCA-COLA BOTTLING COMPANY
*Petitioner*

v.

UNITED STATES OF AMERICA
*Respondent*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

A. H. BRITAIN
Hamilton Building
Wichita Falls, Texas
*Attorney for Petitioner.*

OTIS E. NELSON and
ERNEST ROBERTSON
Wichita Falls, Texas
*Of Counsel*

Fort Worth Brief Printing Co., 208½ West Twelfth Street Phone 2-4070

## INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1-2 |
| Questions presented | 2 |
| Statute involved | 2-3 |
| Statements | 3-5 |
| Specifications of error to be urged | 5 |
| Reasons for granting the writ | 5 |
| Conclusion | 6 |


## CITATIONS

Cases:


| | |
|---|---|
| Northwestern States Portland Cement Company v. Huston, 126 F. 2d, 196 | 5 |
| Wichita Coca Cola Bottling Company v. United States of America, 61 F. Supp. 407 and 152 F. (2d) 6 | 1, 6 |


Statute:


| | |
|---|---|
| Revenue Act of 1938, c. 289, 52 Stat. 447 | 2 |

No._____

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

WICHITA COCA-COLA BOTTLING COMPANY
*Petitioner*

v.

UNITED STATES OF AMERICA
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

*To the Honorable the Supreme Court of the United States:*

The Petitioner, Wichita Coca Cola Bottling Company respectfully shows:

### OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, Wichita Falls Division (R. 16-18) is reported in 61 F. Supp. 407. The opinion of the Circuit Court of Appeals (R. 26-30) is reported in 152 F. (2d) 6.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 10, 1945 (R. 31). The jurisdiction of this court is invoked under Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

I. Whether the sum of $9,111.40 built up over a period of twenty years by petitioner in a special reserve account designated "Deposit on Cases and Bottles" was taxable as income to petitioner in the various years it was received or was it taxable income in 1940, the year such sum was transferred to surplus from the reserve account?

II. Whether a taxpayer who annually reported a special reserve account designated "Deposits on Cases and Bottles" in its income tax return under the heading of "Liabilities" is estopped to claim that the accumulation of the sum of $9,111.40 in the reserve account over a period of twenty years, and upon which no federal income tax was paid, was not income to it in the year 1940 when such sum was transferred to surplus from the reserve account?

## STATUTE INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 22. Gross Income

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out

of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * * * *

## STATEMENT

The facts as stipulated (R. 8-16) and as so found by the United States District Court for the Northern District of Texas, Wichita Falls Division (R. 17) are as follows:

The taxpayer, Wichita Coca Cola Bottling Company, is engaged in the business of bottling and distributing Coca Cola and other soft drinks. (R. 9, 11). Since its inception in 1919, it carried a reserve account generally designated as "Deposit on Cases and Bottles." (R. 9.) In selling its product, the company charged the customer $1.30 for the product, the case and the bottles. Of this amount 80c received for the beverage was credited to the sales account and the remaining 50c was credited to the account "Deposit on Cases and Bottles." (R. 10.) The Company made no attempt to demand the return of cases and bottles from dealers or individuals, but when cases and bottles were returned, 50c was paid, for each case with bottles, to the customer or person who brought them in to the company, without regard to whether such person was the original purchaser of the product. (R. 11.)

As a result of the non-return of cases and bottles, the reserve account "Deposit on Cases and Bottles" increased steadily from 1919 until the balance in this

reserve account as of Dec. 31, 1939 amounted to $10,-261.32. (R. 11, 12.) The reserve account was shown in the company's federal income tax return each year and the taxpayer's returns were investigated for all years except the years 1928, 1931, 1932 and 1934. (R. 14.) In the year 1940 an Internal Revenue Agent audited the company's 1937, 1938, and 1939 income tax statements. In that audit, the agent determined that the increase in the size of the credit balance in the reserve account, for each of those years, was income for that particular year and the taxpayer's returns for those three years was corrected to include this increase in income. (R. 13.) The total amount determined by the Revenue Agent as income for those three years was debited from the reserve account after which a balance of $9,111.40 still remained in the account "Deposit on Cases and Bottles" as of December 31, 1939. (R. 13.) Thereafter in the year 1940, the taxpayer debited the account "Deposit on Cases and Bottles" with the entire balance still remaining in this account and credited the same to its surplus account. (R. 14.) The Commissioner determined that the $9,111.40 transferred from the reserve account to the surplus account was taxable as income for the year 1940 and assessed a deficiency which together with accrued interest totaled $2,188.35. (R. 13.) The assessment was paid by the taxpayer and a claim for refund filed within the proper time. The taxpayer's claim for refund was rejected. (R. 14.) The taxpayer filed suit to recover the alleged overpayment and the United States District Court for the Northern District of Texas, Wichita Falls Division, sustained the Commissioner and denied recovery. (R.

18, 19.) The court below affirmed the decision of the United States District Court.

## SPECIFICATIONS OF ERROR TO BE URGED

I. The Circuit Court of Appeals erred in holding that the transfer of the item of $9,111.40 from the taxpayer's reserve account to its surplus account in the year 1940 created taxable income to the taxpayer in such amount for the year 1940.

II. The Circuit Court of Appeals erred in holding that the taxpayer was estopped to assert that the inclusion of the item of $9,111.40 in the taxpayer's income for the year 1940 was erroneous.

## REASONS FOR GRANTING THE WRIT

The decision of the court below is in direct conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *Northwestern States Portland Cement Company v. Huston*, 126 F. 2d, 196. The difference between the courts stems, first, from varying opinions as to the proper treatment of charges to customers for containers where the amount paid therefor was to be refunded upon the return of the container by the customer to the seller; and secondly, from varying opinions as to the application of the equitable doctrine of estoppel to fact situations that are not distinguishable in principle.

## CONCLUSION

The question presented is one of general application and involves a problem of tax administration on which the circuit courts are in conflict. Since confusion will be unavoidable in the light of this conflict until it has been resolved, it is respectfully submitted that this petition should be granted.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said circuit court had in the case numbered and entitled on its docket, No. 11,420, Wichita Coca Cola Bottling Company, Appellant, vs. United States of America, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of the said circuit court be reversed by the court and for such other relief as to the court may seem proper.

February 1946

A. H. BRITAIN
Hamilton Building
Wichita Falls, Texas
*Attorney for Petitioner.*

OTIS E. NELSON and
ERNEST ROBERTSON
Wichita Falls, Texas
*Of Counsel*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 11 |


## CITATIONS


Cases:

| | |
|---|---|
| *Alamo Nat. Bank* v. *Commissioner*, 95 F. 2d 622, certiorari denied, 304 U. S. 577, rehearing denied, 304 U. S. 590 | 9 |
| *Alpha Portland Cement Co.* v. *United States*, 67 C. Cls. 680 | 10 |
| *Becker* v. *Bemis*, 104 F. 2d 871, certiorari denied, 308 U. S. 613 | 9, 11 |
| *Boston Consol. Gas Co.* v. *Commissioner*, 128 F. 2d 473 | 8 |
| *Burnet* v. *Porter*, 283 U. S. 230 | 7 |
| *Chicago, R. I. & P. Ry. Co.* v. *Commissioner*, 47 F. 2d 990, certiorari denied, 284 U. S. 618 | 8 |
| *Commissioner* v. *Dallas Title & Guar. Co.*, 119 F. 2d 211 | 8 |
| *Commissioner* v. *Liberty Bank & Trust Co.*, 59 F. 2d 320 | 9 |
| *Dewey Portland Cement Co.* v. *Crooks*, 57 F. 2d 499 | 10 |
| *Higgins* v. *Smith*, 308 U. S. 473 | 9 |
| *La Salle Cement Co.* v. *Commissioner*, 59 F. 2d 361, certiorari denied, 287 U. S. 624 | 10 |
| *Maryland Casualty Co.* v. *United States*, 251 U. S. 342 | 8 |
| *North American Coal Corp.* v. *Commissioner*, 97 F. 2d 325 | 8 |
| *Northwestern States Portland Cement Co.* v. *Huston*, 126 F. 2d 196 | 7, 9, 10 |
| *Orange Securities Corp.* v. *Commissioner*, 131 F. 2d 662 | 9 |
| *Robinson* v. *Commissioner*, 100 F. 2d 847, certiorari denied, 308 U. S. 567 | 9 |
| *Stearns Co.* v. *United States*, 291 U. S. 54 | 9 |
| *Virginia Iron Coal & C. Co.* v. *Commissioner*, 99 F. 2d 919, certiorari denied, 307 U. S. 630 | 8 |
| *Warren Service Corp.* v. *Commissioner*, 110 F. 2d 723 | 8 |

Statute:

| | |
|---|---|
| Internal Revenue Code, Sec. 22 (26 U. S. C. Sec. 22) | 2 |




688740—46

# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 921

WICHITA COCA COLA BOTTLING COMPANY,
PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court (R. 16–18) is reported at 61 F. Supp. 407. The opinion of the Circuit Court of Appeals (R. 25–28) is reported at 152 F. 2d 6.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 10, 1945. (R. 29.) The petition for a writ of certiorari was filed March 7, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether the sum of $9,111.40, built up over a period of years in petitioner's liability reserve account designated "Deposit on Cases and Bottles" and upon which no federal income tax had ever been paid, was taxable as income to petitioner in 1940, the year in which such sum was transferred to surplus from the reserve account.

### STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> (26 U. S. C., Sec. 22.)

### STATEMENT

The facts are all stipulated (See R. 8–16) and were found as stipulated by the District Court (R. 17). They may be summarized as follows:

The petitioner, Wichita Coca Cola Bottling Company, was incorporated in Texas and has its

principal place of business at Wichita Falls, Texas. Since its incorporation in 1919, it has been engaged in the business of bottling and distributing Coca Cola and other soft drinks. Each type of drink made by petitioner had a distinctively shaped bottle and had its name imprinted in the glass. All of the cases had the wording "Drink Coca Cola in Bottles" stenciled on the outside of the cases. About 60% of such cases also had the letters "WFCC" stenciled on the outside; approximately 40% of the cases had the wording "Wichita Coca Cola Bottling Company, Wichita Falls, Texas," stenciled on the inside. (R. 9, 11.)

From its inception in 1919 through 1939 petitioner had a reserve account set up for deposits on cases and bottles taken out by customers. The account was generally designated as "Deposit on Cases & Bottles." (R. 9.) When cases and bottles were delivered to a customer, a deposit of 50 cents per case was required of him. This deposit was credited to the reserve account, while the amount received for the beverage itself was credited to the sales account. If and when cases and bottles were returned, the deposit was returned to the customer or to whoever brought them in to petitioner, and the reserve account was thereupon debited. (R. 10.)

In its federal income tax returns petitioner set up expenses for cases and bottles and listed the

reserve account under "Other Liabilities." The return for 1919 covered only the last 16 days of 1919 and did not include any balance sheet or break-down of costs of goods sold. (R. 9.) The 1920 return listed as an expense "Cases and Bottles, replacing wastage, etc.—$20,186.31." In a letter dated December 8, 1921, Deputy Commissioner E. H. Batson inquired of petitioner if the item represented the amount of actual loss sustained on account of bottle breakage and losses or if it also included purchases of cases and bottles which should be included in inventories. By letter dated December 24, 1921, A. M. Biedenhorn, then petitioner's secretary and treasurer, replied that petitioner carried an account "Cases and Bottles" to which all purchases of cases and bottles were debited, that upon closing its books an inventory of all cases and bottles was taken and credited to such account, and that the resultant difference represented the value of cases and bottles lost. (R. 14–15.)

In connection with the audit of the 1924–1926 returns, the Bureau of Internal Revenue questioned the reserve account and the apparent reduction of income by the annual increase in that account. An agent who investigated reported that no part of the account was charged to profit and loss since the money was collected to insure return of the containers and would ultimately be returned 100 cents on the dollar. (R. 15.)

An inventory of the cases and bottles was taken each year, but this inventory did not include the cases and bottles which had been delivered to the customers and which had not been returned at the time of the inventory. (R. 11.)

E. A. Denny, who became petitioner's manager in 1930, knew from past experience that the amount credited to the reserve account each year was in excess of the amount which would have to be paid out on account of the return of cases and bottles. This he knew to be true because there was always breakage or destruction of bottles and cases in the hands of customers, because of his previous experience and because of his knowledge of the increase in the account each year reflected by the books. (R. 12.)

As a result of the non-return of cases and bottles, the reserve listed in petitioner's federal income tax returns for the years 1919 through 1939 increased from year to year. (R. 11–12.) At the end of the year 1939 the credit balance in this account was $10,261.32. (R. 13.)

In 1940 Internal Revenue Agent Jarrett made an audit of petitioner's 1937, 1938 and 1939 income tax statements. In the audit he determined that the increase in the size of the credit balance in the reserve account for each of those years was income and corrected the income tax returns which had previously been filed by petitioner by including in the income for 1937 a profit of $421.45; for the year 1938 a profit of $569.47, and

for the year 1939 a profit of $159, making a total correction of $1,149.92, which is the amount the reserve account increased during the years 1937 to 1939, inclusive. When the agent charged these items to profit for each of those years, an adjustment was made debiting the reserve account for this amount and crediting that amount to profit for the several years. After this debit had been made, the balance of the account at the beginning of 1940 was $9,111.40. (R. 13.)

In 1940 petitioner debited the account called "Deposit on Cases and Bottles" with $9,111.40, which took the reserve account off the books, and credited the same amount to surplus. In its return for 1940 petitioner did not treat the amount of $9,111.40 as income for that year. As a result of an audit made of the return by an internal revenue agent, a deficiency of $2,058.42 in tax and $129.93 in interest, or a total of $2,188.35, was assessed against petitioner for 1940 based on the inclusion of the item of $9,111.40 in petitioner's income for that year. (R. 13–14.)

The 1940 deficiency was subsequently paid by petitioner. (R. 13.) The petitioner thereupon filed a claim for refund which was rejected by the Commissioner. (R. 14.) This suit for a refund was instituted on November 30, 1944. (R. 1.) The District Court denied recovery. (R. 16–19.) On appeal, the Circuit Court of Appeals affirmed the action of the District Court. (R. 25–29.)

ARGUMENT

The decision below is merely an application of well established legal principles and is correct on any one of several grounds. The possibility of conflict with *Northwestern States Portland Cement Co.* v. *Huston*, 126 F. 2d 196 (C. C. A. 8th), on *one* of the grounds is insufficient, we submit, to warrant further review of the case by this Court.

Petitioner's reserve account entitled "Deposit on Cases & Bottles" represented its contingent liability for refunds of deposits it had received for cases and bottles. Since more cases and bottles were delivered than were returned for refund, the balance in the reserve account steadily increased over the years. This excess reserve represented receipts on which no income tax had been paid, for taxpayer had set up the account and treated the balance in it as a liability instead of treating the transactions with respect to cases and bottles as sales and including the receipts therefrom in income or instead of including the value of the outstanding cases and bottles in an inventory account to offset the reserve account. In 1940, after an internal revenue agent had adjusted petitioner's returns for 1937–1939, inclusive,[1] petitioner transferred the remaining balance in the reserve account,

[1] The fact that an adjustment in petitioner's returns was made on one theory for certain years does not, of course, preclude the Commissioner from an examination and determination of tax liability on a different theory for another year. See *Burnet* v. *Porter*, 283 U. S. 230.

the excess reserve, to its surplus account. It is well settled that the excess in a reserve account is to be treated as income in the year it is released, since it then for the first time becomes available as free income. *Maryland Casualty Co.* v. *United States,* 251 U. S. 342, 352; *Boston Consol. Gas Co.* v. *Commissioner,* 128 F. 2d 473 (C. C. A. 1st); *Commissioner* v. *Dallas Title & Guar. Co.,* 119 F. 2d 211 (C. C. A. 5th); *North American Coal Corp.* v. *Commissioner,* 97 F. 2d 325 (C. C. A. 6th); *Chicago, R. I. & P. Ry. Co.* v. *Commissioner,* 47 F. 2d 990 (C. C. A. 7th), certiorari denied, 284 U. S. 618; *Virginia Iron Coal & C. Co.* v. *Commissioner,* 99 F. 2d 919 (C. C. A. 4th), certiorari denied, 307 U. S. 630; *Warren Service Corp.* v. *Commissioner,* 110 F. 2d 723 (C. C. A. 2d).

While it may have been possible for petitioner to have handled the transactions in cases and bottles in a different manner and to have reported the income from the transactions on a yearly basis, petitioner is in no position now, after the statute of limitations has run as to prior tax years, to contend, as it has (see R. 27), that its receipts for the cases and bottles were receipts from sales, not deposits, and that the receipts were taxable in years now barred from assessment. Not only did petitioner represent such receipts as deposits subject to refund, but, knowing that the reserve was in excess of what would actually have to be paid out as refunds, its officers misrepresented the reserve account to internal revenue

officers, once by asserting that the account represented only lost bottles and that its inventories were consistent with its treatment of the account and once by persuading an agent that the existence of the account had no effect on profit and loss with respect to the 1924–1926 returns. Even assuming that petitioner's treatment of these deposits was wrong, it is well settled that a taxpayer is not permitted to found a claim upon his own inequity or to take advantage of his own wrong. *Stearns Co.* v. *United States,* 291 U. S. 54, 61–62; *Higgins* v. *Smith,* 308 U. S. 473, 477; *Becker* v. *Bemis,* 104 F. 2d 871, 876 (C. C. A. 8th), certiorari denied, 308 U. S. 613; *Robinson* v. *Commissioner,* 100 F. 2d 847 (C. C. A. 6th), certiorari denied, 308 U. S. 567; *Commissioner* v. *Liberty Bank & Trust Co.,* 59 F. 2d 320 (C. C. A. 6th); *Orange Securities Corp.* v. *Commissioner,* 131 F. 2d 662 (C. C. A. 5th); *Alamo Nat. Bank* v. *Commissioner,* 95 F. 2d 622 (C. C. A. 5th), certiorari denied, 304 U. S. 577, rehearing denied, 304 U. S. 590.

*Northwestern States Portland Cement Co.* v. *Huston, supra,* is distinguishable on its facts. In that case the taxpayer had, at different times, transferred funds from its surplus account to a reserve account entitled "Reserve for Loss on Sacks" to cover its anticipated losses on the return of cement sacks. In 1932, when the taxpayer ascertained that the reserve was excessive and transferred $75,000 back to surplus, the Commis-

sioner sought to tax this $75,000 as income. The court's ultimate conclusion was that income was realized by the taxpayer in each prior year to the extent that the reserves exceeded actual liability in that year, not by the book transfer of what had always been a part of the taxpayer's surplus account. The transactions in sacks were treated by the taxpayer as sales, rather than as deposits, as here.[2] In any event, while the court's conclusion as to the sack transactions may perhaps be deemed inconsistent with the decision below, the ultimate reason for the result reached was that no contention was made that the taxpayer had ever misrepresented to the Commissioner or his agents any facts with respect to the reserve account or that the Commissioner, in reviewing and auditing the taxpayer's returns and books, did not ascertain the nature of the liability which the reserve account was set up to reflect. In the instant case the nature of petitioner's "Deposits on Cases & Bottles" account was obscure and petitioner's officers made misrepresentations in regard to it. The *Northwestern States Portland Cement Co.* case was decided by the Circuit Court of Appeals

[2] It appears to be quite common to treat transactions in cement sacks as sales. See *Dewey Portland Cement Co.* v. *Crooks*, 57 F. 2d 499 (C. C. A. 8th); *La Salle Cement Co.* v. *Commissioner*, 59 F. 2d 361 (C. C. A. 7th), certiorari denied, 287 U. S. 624. Experience has taught that about 90% of the cement sacks are returned for refund. *Alpha Portland Cement Co.* v. *United States*, 67 C. Cls. 680; *La Salle Cement Co.* v. *Commissioner*, *supra*.

for the Eighth Circuit and that court is in agreement with the court below as to the law of equitable estoppel as applied in tax cases. Cf. R. 28 with *Becker* v. *Bemis, supra,* pp. 875–876.

## CONCLUSION

The decision below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
*Solicitor General.*
SEWALL KEY,
*Acting Assistant Attorney General.*
ROBERT N. ANDERSON,
MELVA M. GRANEY,
*Special Assistants to the Attorney General.*

APRIL, 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946